

NATURAL RESERVES GROUP, INC.,

Plaintiff,

vs.

BAKER HUGHES INC., et al.,

Defendants.

IN THE DISTRICT OF

HARRIS COUNTY, TEXAS

333RD JUDICIAL DISTRICT

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS BASED ON
DEFENDANTS' INDEPENDENT DEVELOPMENT OF INFORMATION
CONTAINED IN BAKER HUGHES' PATENTS**

SUMMARY OF ARGUMENT

Defendant Baker Hughes Inc. and all of the other defendants (collectively "defendants") are entitled to entry of summary judgment on every claim in the Second Amended Original Petition filed by plaintiff Natural Reserves Group, Inc. ("NRG"). The undisputed record evidence demonstrates that defendants independently developed the information used and disclosed in the Baker Hughes patents without assistance from NRG's "proprietary information," thus disproving an essential element of each of NRG's claims. NRG sets forth no evidence to dispute the material facts in the evidence of record. Also, NRG sets forth no evidence to support that essential element.

Instead, unable to respond with any record evidence even arguably presenting a triable issue of fact or to support that essential element, NRG concocts a story rife with intrigue and innuendo, but supported only by conjecture and speculation rather than evidence. NRG's story, however, is contradicted by all of the record evidence. NRG asserts only that all of the undisputed facts and

evidence should be disbelieved and summarily dismissed as incredible, and that NRG's unsupported theory of the case should be believed as plausible.

Such an unfounded theory cannot suffice to avoid summary judgment. NRG cannot avoid summary judgment by merely suggesting that a jury may choose to ignore all of the evidence and decide in NRG's favor based on sympathy, suspicion, or other impermissible grounds. NRG must come forward with admissible evidence creating a genuine issue of fact to withstand summary judgment. Having failed to do so, and because defendants have provided undisputed evidence disproving an essential element of each of NRG's claims, defendants are entitled to summary judgment as a matter of law on every claim.

ARGUMENT

- I. SUMMARY JUDGMENT IS APPROPRIATE ON EACH OF NRG'S CLAIMS BECAUSE NRG HAS FAILED TO RAISE A DISPUTED ISSUE OF MATERIAL FACT THAT DEFENDANTS INDEPENDENTLY DEVELOPED THE MATERIAL IN THE PATENTS AT ISSUE.

Summary judgment is appropriate in this case. "A defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action . . . is entitled to summary judgment." Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995); see Black v. Victoria Lloyds Ins. Co., 797 S.W.2d 20, 27 (Tex. 1990). Also, a matter is conclusively negated "if ordinary minds cannot differ as to the conclusion to be drawn from the evidence." Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 657-58 (Tex. App.—Dallas 1992, no writ) (emphasis added). In addition, the Texas Supreme Court recently put into effect a "no evidence" summary judgment rule—Tex.R.Civ.P. 166a(i)—which specifically allows a party to obtain summary judgment when no evidence exists to support an essential element of the claims and requiring a court to grant

summary judgment unless the respondent produces summary judgment evidence raising a genuine issue of material fact.¹

These standards establish that NRG can avoid summary judgment only if there is evidence from which a reasonable jury could conclude that defendants did not independently develop the information in defendants' patents. Supposition and unfounded suspicion will not suffice. Because NRG has failed to point to any such evidence, defendants are entitled to summary judgment as a matter of law.

A. Defendants' Evidence Establishing that Daniel Bangert of Defendant Baker Oil Tools Independently Developed the Information in Defendants' Patents Remains Uncontroverted.

In support of their motion, defendants submitted a large amount of evidence establishing that, during a "brainstorming meeting" on January 7, 1992, Dan Bangert of Baker Oil Tools conceived and developed the information in defendants' patents at issue. Defendants' Motion for Summary Judgment on All Claims Based on Defendants' Independent Development of Information Contained in Baker Hughes' Patents at 6, ¶¶ 8-9 (July 21, 1997) ("Defendants' Motion"). Defendants also submitted voluminous evidence demonstrating that Mr. Bangert's development was done independently of any of NRG's proprietary information, and that Mr. Bangert never even knew of or had any access to NRG's proprietary information. *Id.* at 6-12 (¶¶ 10, 13-15, 17-18).

In particular, Mr. Bangert (whose employment with defendants ceased over 5 years ago) attested and testified that he conceived and developed the method for completing a horizontal/vertical wellbore junction without assistance from any information from anyone, including NRG. Defendants' Motion at 6-7 (¶ 10). Indeed, Mr. Bangert testified and attested that he has never met anyone from NRG, has never attended any meetings in which NRG was discussed, and has never seen or had described to him any information from NRG, including any

¹ Rule 166a(i) took effect on September 1, 1997, and applies to Defendants' Amended Motion for Summary Judgment on All Claims in Plaintiff's First Amended Original Petition (Sept. 12, 1997).

information relating to methods of sealing a junction between a vertical wellbore and a lateral wellbore. *Id.* NRG has deposed Mr. Bangert and engaged in discovery for over a year, and thus had the opportunity to obtain any evidence to controvert these facts, but has failed to do so.

In addition, defendants have provided still more undisputed evidence providing separate confirmation of Mr. Bangert's independent development. In particular, defendants set forth all of the record evidence establishing that NRG's technology was never even disclosed to anyone at Baker Oil Tools, let alone to Mr. Bangert, prior to Mr. Bangert's conception and development of the patented method. Every potential source for the disclosure of NRG's proprietary information has been probed, and correspondingly foreclosed, by the discovery conducted by NRG. Specifically, while there is some evidence that NRG may have disclosed some of its "proprietary information" in early December 1991 to Keith Trichel, Joel Creider, and Michael Watson of Eastman Christensen (*id.* at 8-9 (¶ 13)), the testimony from those three employees, and the related documentary evidence, is uncontroverted that those employees did not disclose any such information to anyone else at Eastman Christensen, let alone to anyone at Baker Oil Tools, including Mr. Bangert. *Id.*²

In particular, Mr. Creider and Mr. Watson attested that they "never showed or described to anyone at [Eastman Christensen] any information related to [them] by Mr. Graham of NRG" and that "[f]rom mid-1991 through at least mid-1992" or "at least April of 1992" they "never showed or described any information related to [them] from Mr. Graham of NRG to anyone at Baker Oil Tools or any of the other divisions or subsidiaries of Baker Hughes Inc." Exhibit 41 at ¶¶ 4-5 to Defendants' Motion; Exhibit 40 at ¶¶ 4-6 to Defendants' Motion. Also, Mr. Trichel, testified:

² Defendants also submitted evidence that the only other possible (but unlikely) disclosure that NRG made to any of the defendants prior to Mr. Bangert's development were made to Eastman Christensen in early January 1992, and that the information from any such disclosure was not disclosed by anyone at Eastman Christensen to anyone at Baker Oil Tools, including Mr. Bangert. Defendants' Motion at 9-10 (¶¶ 14-15). Although NRG refers in passing to this possible disclosure, NRG does not dispute that Mr. Bangert did not learn about any NRG information from this possible disclosure. *See* Plaintiff's Response to Defendants' Motion at 19, 37-40 (Sept. 5, 1997).

Q. . . . During this period of time, did you have occasion to talk to anyone from the other Baker Hughes divisions about the NRG ideas?

A. No.

...

Q. Did you ever talk to anyone at Baker Oil Tools about the NRG technology?

A. No.

Exhibit 37 at 49, 73 to Defendants' Motion.³ Thus, that evidence fully corroborates Mr. Bangert's testimony and affirmatively precludes proof of an essential element of each of NRG's claims.

In addition, however, defendants also submitted evidence that there was not even any communication between anyone at Baker Oil Tools and Eastman Christensen in the 1991-92 time frame concerning the general subject matter of the technology involved in this case. Defendants' Motion at 12 (¶ 17). Also, although Eastman Christensen and Baker Oil Tools were parts of separate subsidiary corporations of Baker Hughes Inc., the two companies were very autonomous and Eastman Christensen had offices at a different location than Baker Oil Tools, the division for whom Mr. Bangert worked. *Id.* at 8-9, 11-12 (¶¶ 13, 17, 18). Accordingly, that evidence further corroborates the fact that Mr. Bangert never received, and never received assistance from, any NRG proprietary information.⁴

³ Mr. Trichel also testified that the only person to whom he spoke or reported at all concerning the December 1991 meeting with NRG was Roger Fincher of Eastman Christensen, and Mr. Trichel's and Mr. Fincher's testimony, and Mr. Trichel's only written report about that meeting, confirm that NRG's technology was not disclosed to Mr. Fincher. Exhibit 37 at 41-42 to Defendants' Motion; Exhibit 42 at 24-25, 34-35, 37 to Defendants' Motion; Exhibit 44 to Defendants' Motion. NRG never even seeks to dispute these facts.

⁴ Moreover, there is no evidence that Mr. Bangert obtained any of NRG's information during the January 7, 1992 brainstorming meeting. By the time of that meeting, none of the other people present at the meeting had ever heard of NRG or its employees, and had never seen any materials relating to NRG's technology. Defendants' Motion at 7-8 (¶ 11). Also, even assuming that any of those other people knew about or had seen NRG's technology, it is uncontroverted that no one assisted Mr. Bangert in his conception or development during that meeting. *Id.*

B. NRG has Presented No Evidence that Dan Bangert Knew of or Obtained any of NRG's Proprietary Information, and Thus has Failed to Raise any Issue Whether Mr. Bangert Independently Developed the Information in Defendants' Patents.

NRG submits only speculation, rather than supporting evidence, in response to defendants' motion, and thus has failed to raise any issue whether Mr. Bangert independently developed the information in defendants' patents. NRG devotes a large amount of space in its response discussing numerous matters that are immaterial to defendants' motion for summary judgment. See Plaintiff's Response to Defendants' Amended Motion for Summary Judgment on All Claims in Plaintiff's First Amended Original Petition at 1-5, 8-17, 18-31 (Oct. 30, 1997) ("NRG Response").⁵ Only in a very small portion of that response does NRG even attempt to set forth a theory of how Mr. Bangert might not have independently developed the information at issue. See id. at 17-18, 38, 39-40. However, NRG puts forth no evidence to support that theory, and that theory is contrary to all of the evidence of record. Thus, based on the undisputed evidence, the only conclusion that can be reached is that Mr. Bangert independently developed the information.

1. NRG Relies Entirely on Two Daytimer Entries to Avoid Summary Judgment, but Those Entries Do Not Raise any Issue Concerning Mr. Bangert's Independent Development.

NRG submits no evidence, only speculative theory, in its attempt to controvert Mr. Trichel's testimony and other evidence that he did not disclose NRG's technology to anyone at Baker Oil Tools or anywhere else. In particular, NRG cites to an entry in the daytimer of Mr. Grahame Newton from December 6, 1991, which states "Cameron 1:30—completions for multiples" and above that states "canceled—K. Trichel to sit in for me." Exhibit 48; NRG Response at 39; see id. 17. NRG then speculates that, "[i]n light of all of the circumstances

⁵ In response to defendants' motion, NRG filed a response on September 5, 1997 and also filed Plaintiff's First Amended Original Petition. Because of the amended claims, defendants then filed an Amended Motion for Summary Judgment on September 10, 1997 to incorporate the amended claim language into their motion. NRG's response to the amended motion contains the same material as in NRG's original response plus some additional material. Accordingly, for purposes of clarity, defendants refer only to NRG's amended response because the amended response is more comprehensive, although this reply memorandum addresses NRG's response and amended response together.

described above, it is difficult to believe that in a meeting supposedly scheduled to specifically consider multilateral completions, Trichel would not have mentioned to [Cameron] White the 'innovative' completion concept he had seen just the day before." Id. at 39.

This daytimer entry creates no genuine issue of fact. As NRG admits, the entry concerns only the "scheduling" of a meeting, and thus provides no indication of whether such a meeting even took place. Indeed, the daytimer entry was made by Mr. Newton, who was not even scheduled to participate in the proposed meeting. His entry therefore cannot reflect whether any meeting took place or, if there was a meeting, what subject was discussed.⁶

Even assuming that Mr. Trichel met with Mr. White on December 6, 1991 and discussed "completions for multiples," the daytimer entry does not controvert Mr. Trichel's testimony that he did not even talk to anyone at Baker Oil Tools, including Mr. White, about NRG's ideas. Exhibit 37 at 49, 73 to Defendants' Motion. Also, it does not controvert Mr. White's testimony that he "did not" "have any conversations with Keith Trichel in December, 1991 with respect to NRG and completions for multiples," and that he had never even heard of NRG or seen any materials relating to NRG's technology by the time of Mr. Bangert's independent development in the January 7, 1992 brainstorming meeting. Exhibit 20 at 173, 171-72 to Defendants' Motion. Moreover, the daytimer entry makes no reference to any discussion of "NRG." Exhibit 48. NRG's bald assertion that this evidence is, in NRG's opinion, "difficult to believe," despite the fact that it is corroborated by all the testimonial and documentary evidence in the case, is insufficient to preclude summary judgment.

Further, apparently realizing that Mr. Trichel's supposed meeting with Mr. White is insufficient by itself to defeat defendants' motion, NRG also postulates that Mr. White then told NRG's ideas to Mr. Bangert. In particular, NRG argues that, because Mr. Bangert was Mr. White's boss at Baker Oil Tools, "it would be very surprising had White not informed his boss of an

⁶ Consequently, Mr. Newton testified that his daytimer entry merely implies that the meeting was scheduled, but also implies that "it cancelled." Exhibit 38 at 40-41 to Defendants' Motion.

innovative multilateral completion technique that he had just heard about.” NRG Response at 40; see id. at 18. NRG cites no evidence to support this assumption based on an assumption. There is no evidence in the record of any meeting between Mr. Bangert and Mr. White at all, let alone any meeting vaguely relating to the subject matter at issue. See id. Thus, NRG fails to submit anything but unsupported speculation to support this theory. Such speculation is insufficient to controvert Mr. Bangert’s testimony and attestation that he developed the information in the Baker Hughes patents without assistance or any information from anyone, and that he had never even heard of NRG, nor seen or had described to him any NRG information. Exhibit 17 ¶¶ 9-11 to Defendants’ Motion; Exhibit 18 at 43, 84-85, 32, 71, 82-83, 34-36 to Defendants’ Motion. It is also insufficient to controvert Mr. White’s testimony that he had never even heard of NRG or seen any materials relating to NRG’s technology by the time of Mr. Bangert’s independent development in the January 7, 1992 brainstorming meeting. Exhibit 20 at 171-73 to Defendants’ Motion.

NRG’s only remaining attempt to create a factual issue also fails. NRG asserts that there “is even evidence directly linking Bangert to Trichel on December 6, 1991” because of an entry in Mr. Bangert’s daytimer for that day stating “EC short radius drilling project.” NRG Response at 40; see id. at 18. NRG then speculates that “[a] very reasonable inference can be made that the person Bangert met with was Trichel” because Mr. Trichel’s job “was to provide technical data on short radius drilling.” Id. at 40; see id. at 18. However, even taking as true all of NRG’s convoluted and unsupported assumptions, which are contradicted by the testimony of Mr. Trichel and Mr. Bangert, the daytimer entry contains no evidence even suggesting that Mr. Trichel ever disclosed NRG’s ideas to Mr. Bangert on that date.

In addition, there is no evidence to support NRG’s speculation that the daytimer entry means that Mr. Bangert and Mr. Trichel might have met on December 6, 1991. Mr. Bangert’s daytimer entry in its entirety states “Gus, short-radius project” “with EC for two to three months.” Deposition of Daniel Bangert at 88 (excerpts attached as Exhibit 50); Exhibit 49. Thus, the entry does not even refer to Mr. Trichel, nor does it even refer to a meeting being scheduled with him or

anyone else. Indeed, the only evidence relating to the entry is Mr. Bangert's testimony that the entry did not refer to a meeting with anyone, but instead referred to Mr. Kirton at Baker Oil Tools asking Mr. Bangert to "find a candidate [from Baker Oil Tools] . . . [to] assist Eastman Christensen" "in their short-radius drilling project" and that Mr. Bangert suggested "Gus" Mullins. Exhibit 50 at 89, 88, 91.

Most importantly, however, because the daytimer entry does not suggest that Mr. Bangert and Mr. Trichel met, it cannot controvert the testimony of Mr. Bangert and Mr. Trichel that they do not even know each other to this day, nor have they ever spoken. Exhibit 18 at 32-33 to Defendants' Motion; Exhibit 37 at 75 to Defendants' Motion. Also, the daytimer entry does not controvert the testimony of Mr. Trichel and other evidence that he never disclosed NRG's ideas to anyone at Baker Oil Tools or any other company. Exhibit 37 at 49, 73 to Defendants' Motion. It also does not controvert Mr. Bangert's testimony and attestation that he developed the information in defendants' patents without assistance from any information from anyone, and that he had never even heard of NRG, nor seen or had described to him any NRG information. Exhibit 17 ¶¶ 9-11 to Defendants' Motion; Exhibit 18 at 43, 84-85, 32, 71, 82-83, 34-36 to Defendants' Motion. Consequently, that entry does not constitute evidence sufficient to raise any genuine issue of disputed fact.

2. NRG's Other Arguments Similarly Fail to Create any Issue Concerning Mr. Bangert's Independent Development.

Moreover, NRG also fails to submit any evidence to dispute the fact that there was no communication in the pertinent time frame between Eastman Christensen and Baker Oil Tools at all concerning even the general subject matter relating to the technology in this case. On that subject, NRG cites testimony from Mr. Trichel that Cameron White was his contact at Baker Oil Tools, and that Mr. Trichel would contact Mr. White whenever he had any questions concerning completions technology. NRG Response at 38. NRG also cites testimony of Mr. Newton, another employee of Eastman Christensen, that Mr. White was his contact at Baker Oil Tools. *Id.* However, that

evidence establishes only that Mr. White was a person that Mr. Trichel and Mr. Newton could contact and may have contacted from time to time. It does not in any way support a conclusion that Mr. Trichel or Mr. Newton ever talked to Mr. White in December 1991 or January 1992 about any technology at all. It further does not support a conclusion that they discussed the general subject matter of completions technology, let alone that they discussed NRG's technology. Moreover, any such speculation is expressly precluded by the testimony of the individuals involved.

NRG's reliance on Felker v. Petrolon, Inc., 929 S.W.2d 460 (Tex. App.—Houston [1st Dist.] 1996, writ denied) to support its argument is woefully misplaced. NRG asserts that Felker supports the use of circumstantial evidence in the form of meetings or telephone conversations to infer that "Trichel disclosed NRG's Technology to White and Bangert in December 1991." NRG Response at 41. To the contrary, Felker holds only that "[a]n ultimate fact may be established by circumstantial evidence" only "when the circumstances relied on are of such a character as to be reasonably satisfactory and convincing, and are not equally consistent with the nonexistence of the ultimate fact." Felker, 929 S.W.2d at 463-64. As set forth above, the circumstantial evidence on which NRG relies in this case clearly fails this test. NRG's speculations do not even establish any meetings or conversations between Mr. Bangert and either Mr. Trichel or Mr. White at all; thus, nothing can be inferred from any such contact. Such circumstantial evidence also is insufficient because it is "equally consistent with the nonexistence" of any disclosure of NRG's ideas by Mr. Trichel to anyone, especially in light of all of the undisputed facts in that regard.

In any event, NRG's "circumstantial evidence" is insufficient on its face to establish any fact to avoid summary judgment as a matter of law. As the Texas Supreme Court held in Transport Ins. Co. v. Faircloth, 898 S.W.2d 269 (Tex. 1995), "[c]ircumstantial evidence may be used to establish any material fact, but it must constitute more than mere suspicion" because "some suspicion linked to other suspicion produces only more suspicion, which is not the same as evidence." Id. at 278. Likewise, in this case, NRG uses a couple of daytimer entries to support NRG's mere suspicion that certain people may have met, and thus to produce NRG's further

suspicion that those people may have discussed NRG's ideas in such meetings, and to produce yet more NRG suspicion that Mr. Bangert's ideas may have been taken from NRG's ideas. Consequently, NRG's assertions are "not the same as evidence," and cannot be used to avoid summary judgment.

C. NRG Fails to Create any Issue of Fact Relating to the Sufficiency or Credibility of Defendants' Evidence of Mr. Bangert's Independent Development.

Although NRG's failure to show that Mr. Bangert ever knew of or had access to NRG's proprietary information is dispositive on summary judgment, NRG also fails to create any issue of fact relating to the sufficiency or credibility of defendants' evidence that Mr. Bangert independently developed the information in defendants' patents. In support of their motion, defendants submitted a voluminous amount of testimonial and documentary evidence showing Mr. Bangert's development. Mr. Bangert testified and attested in detail about his conception and development of the information in defendants' patents during a brainstorming meeting at Baker Oil Tools on January 7, 1992. Exhibit 17 at ¶¶ 5-9 to Defendants' Motion; Exhibit 18 at 28-30, 34-35, 43, 48, 83-85 to Defendants' Motion. Mr. White also testified about his specific recollection that the meeting took place on January 7, 1992, and about Mr. Bangert's conception and development of the information in that meeting. Exhibit 20 at 204-09 to Defendants' Motion.⁷

Additional documentary and testimonial evidence confirm those facts. Mr. Bangert's "Invention Disclosure," which contains a detailed description and drawings of the invented information, explicitly states that "January 7, 1992" was the "Earliest Date Invention Was Conceived." Exhibit 22 to Defendants' Motion. Mr. Thomas Tilton, who witnessed the Invention Disclosure, testified that he attended the January 7, 1992 meeting, and that his witnessing of Mr. Bangert's Invention Disclosure constituted affirmation that he "knew [the invention] was conceived

⁷ Robert McNair also testified in detail to precisely the same effect about Mr. Bangert's conception and development of the information in a brainstorming meeting at "the end of '91 or ... early '92." Deposition of Robert McNair at 44-46 (excerpts attached as Exhibit 51); Exhibit 19 at 99 to Defendants' Motion.

on the 7th.” Exhibit 21 at 115-17 to Defendants’ Motion; Deposition of F. Thomas Tilton at 77-78 (excerpts attached as Exhibit 52). Further, an internal memorandum from Mr. White dated January 28, 1992 contains excerpts from “MULTI LATERAL Meeting Minutes” of “Jan. 7, 1992” and states that after reviewing the “notes from the multilateral brainstorming session on Jan. 7, I came across two ideas other than Dan[Bangert]’s idea for milling the cemented liner off flush.” Exhibit 23 to Defendants’ Motion. Also, there is a January 3, 1992 internal memorandum inviting Mr. Bangert and others to the meeting “on Tuesday, Jan. 7 . . . to discuss multiple lateral horizontal completions,” and the daytimers of Mr. Bangert and Mr. Tilton for January 7, 1992 contain the entries “multiple lateral mtg” and “multi laterals,” respectively. Exhibits 24, 25, & 26 to Defendants’ Motion. NRG has set forth no evidence creating a genuine issue of fact in this regard.

1. NRG Creates No Issue of Fact Concerning the Sufficiency of Defendants’ Evidence of Independent Development.

NRG’s challenge to the sufficiency of defendants’ evidence of Mr. Bangert’s independent development is baseless. Incredibly, NRG merely asserts that all of the evidence should be summarily dismissed as insufficient or not credible, even though there is no evidence to the contrary. NRG first erroneously asserts that “there is absolutely no record at Baker Hughes with respect to an alleged meeting on January 7, 1992.” NRG Response at 19. However, the only evidence NRG cites for support is Mr. White’s testimony that he did not know if there were any official “minutes” made of the meeting. Deposition of L. Cameron White at 50 (attached as Exhibit 53). That testimony does not prove that there is no record to support the fact of the meeting, nor does it contradict the fact that the meeting took place. Indeed, NRG shamelessly ignores the documents submitted by defendants in support of their motion, and which are discussed above, proving that the meeting took place, and which constitute a record of the meeting.⁸

⁸ NRG also incorrectly argues that “[m]ost of the alleged participants in the January 1992 meetings have no recollection of Bangert presenting any completion concept.” NRG Response at 19; *see id.* at 34. Contrary to NRG’s suggestion that those participants actually denied that Mr. Bangert conceived and developed any idea in the meeting, they testified (in the testimony NRG cites) only that they could not remember in sufficient detail whether he presented such a concept or not.

NRG further incorrectly argues that “[d]efendants’ only summary judgment evidence showing independent development is the testimony of Bangert.” NRG Response at 35. Specifically, NRG improperly seeks to summarily dismiss all of defendants’ other evidence because it allegedly does not prove that Mr. “Bangert invented the technology.” *Id.* at 33. NRG asserts that such evidence proves only that Mr. Bangert presented the invention at the January 7, 1992 meeting, and does not “negate[] NRG’s contention that [Mr.] Bangert based his presentation on NRG’s disclosures.” *Id.* at 33-34.

To the contrary, that evidence need not “negate” NRG’s contention because, for the reasons set forth in detail above, there is no evidence to support NRG’s contention that Mr. Bangert ever knew of or had access to NRG’s proprietary information. Thus, because of the stark absence of any evidence to suggest anything to the contrary, defendants’ evidence concerning Mr. Bangert’s conception and development is much more than sufficient to prove that he independently developed the information in defendants’ patents.⁹ Indeed, although NRG refers to defendants’ five pieces of “documentary evidence” in this regard as “scant” evidence (NRG Response at 35), they constitute precisely five documents more than NRG has to support its wildly concocted theory. Accordingly,

Exhibit 52 at 107-08; Deposition of David McStravick at 59-60 (attached as Exhibit 54); Deposition of Ron Curington at 14-16 (attached as Exhibit 55); Deposition of Billy Ray Newman at 27-28 (attached as Exhibit 56); Deposition of Douglas Murray at 107-08 (attached as Exhibit 57). Although NRG also cites portions of Mr. Bangert’s deposition for support (NRG Response at 19, 34), he testifies only that he could not recall the “specifics of that descriptive review of the idea,” the express “words [he] used to describe [his] concept,” or whether he made a sketch of the idea in that meeting, not that he did not conceive the invention and present it. Exhibit 50 at 36-37. Indeed, NRG conveniently ignores Mr. Bangert’s testimony concerning his development and presentation of the invention in that meeting. Exhibit 18 at 34-35 to Defendants’ Motion.

⁹ NRG similarly asserts that the witness testimony of Mr. Bangert’s conception and development of the invention cannot prove his independent development of it because those witnesses “had no way of knowing whether Bangert had seen or heard of (or discussed with Trichel) the NRG disclosures prior to the [January 7] meeting.” NRG Response at 34. Ironically, one of those witnesses (Mr. White) is the person that NRG speculates might have obtained NRG’s disclosures from Mr. Trichel and disclosed them to Mr. Bangert (*id.* at 17-18, 39-40), and thus Mr. White’s uncontroverted testimony to the contrary would therefore conclusively prove Mr. Bangert’s independent development.

defendants' proof of independent development comes not only from Mr. Bangert, but from a great deal of corroborating evidence in the form of testimony and documents.¹⁰

2. NRG Creates No Issue of Fact Concerning the Credibility of Mr. Bangert's Testimony of Independent Development.

NRG's challenge to the credibility of Mr. Bangert's testimony of independent development is similarly meritless. Blatantly ignoring all of the evidence corroborating Mr. Bangert's testimony, NRG attacks Mr. Bangert's testimony as "inherently incredible." NRG Response at 42. However, there is nothing in his testimony or any other evidence to cast any doubt on Mr. Bangert's credibility. Instead, all of that evidence set forth above is consistent with his testimony. Further, Mr. Bangert testified that he used the "knowledge that [he'd] gained [while working] in operations engineering" for Baker Oil Tools to "c[o]me up with a way of [completing a multilateral well junction] using existing technologies" during the January 7, 1992 meeting. Exhibit 18 at 35 to Defendants' Motion. Thus, his idea was based on the use of old and existing technology, did not require that he invent any new or exotic technology, and that technology was well known to him from his past working experience.

NRG incorrectly asserts that Mr. Bangert testified that he did nothing but walk into a meeting and come up with the technology in a "flash" and then did no follow up work. NRG Response at 41, 19-20. To the contrary, Mr. Bangert testified only that he "did not recall" whether he had done any work or given the concept any thought before the meeting, whether he had reviewed the work of others at Baker Oil Tools before the meeting, or whether he did any work on the technology after the meeting. Exhibit 50 at 33-34, 70. His testimony that he does not recall

¹⁰ NRG also erroneously states that the credibility of the statements made in Mr. Bangert's invention disclosure "are solely dependent on Bangert's credibility." NRG Response at 35. To the contrary, as set forth above, Mr. Tilton expressly testified that he signed the disclosure as a witness because he "knew [the invention] was conceived on the 7th" by Mr. Bangert. Exhibit 21 at 115-17 to Defendants' Motion.

whether certain events took place is not evidence that the events did not occur.¹¹ Further, Mr. Bangert also merely speculated that “[p]erhaps” it came to him in a flash or took “five minutes,” but that he did not remember precisely how long it took him to develop the idea in the meeting. Exhibit 18 at 35 to Defendants’ Motion. Contrary to NRG’s suggestion, Mr. Bangert’s inability to recall intricate details about what he did prior to, during, and after the meeting if anything enhances his credibility because, as Mr. Bangert stated, the meeting took place “six years ago.” *Id.* at 29.¹²

Although not material to the credibility of Mr. Bangert’s testimony concerning his development of the technology, it is noteworthy that the evidence relating to Mr. Graham’s actual conception of such technology for NRG is sparse at best. In his affidavit, submitted by NRG in response to defendants’ motion, Mr. Graham gives no details of how he conceived of any part of the idea for the technology at issue at all, nor does he discuss how long it took him to think of any part of the idea. *See* Exhibit A at ¶ 8 to NRG Response. Instead, he discusses only how he had a large general problem relating to the Saratoga Field that he wanted to solve for NRG (of which the technology at issue was only an “aspect”). *See* Exhibit A at ¶¶ 4-8 to NRG Response. Mr. Graham’s entire description of his conception is that, during the process of arriving at what he

¹¹ NRG similarly asserts that Mr. Bangert did not “keep any sketch of his concept that he prepared at the [January 7, 1992] meeting, and his earliest documentation of the concept was January 28, 1992.” NRG Response at 20; *see id.* at 41, 34-35. In the testimony NRG cites, Mr. Bangert states only that he does not recall whether he took his sketches from the meeting with him, and that he does not have any other sketches of the concept from that meeting other than the ones attached to his Invention Disclosure. Exhibit 50 at 37. However, he testified that the sketches attached to his Invention Disclosure could have been made at any time between January 7 and January 28, 1992. Exhibit 18 at 43 to Defendants’ Motion.

¹² For the same reason, NRG’s assertion that an internal memorandum from Mr. White suggesting that the process of developing the technology likely will be “iterative” contrasts with Mr. Bangert’s claim that he invented the technology in a “flash” (NRG Memorandum at 19-20, 15-16), is also erroneous because Mr. Bangert never so testified. Also, NRG misrepresents the statement in Mr. White’s memorandum. Mr. White merely states that developing a commercial product that a customer wants likely will be an “iterative” process with repeated review by the customer and refinement by Baker Oil Tools. *See* NRG Response at 15. He never states or implies that conceiving and developing any inventive method will require any such “iterative” process. *See id.* In any event, Mr. White’s memorandum merely comments on what he expects, and thus has no bearing on whether Mr. Bangert independently developed the technology. *Id.*

thought would solve that problem, he “conceived a multilateral well completion system” by “October 1991,” and that his “October 15, 1991 hand written notes show the earliest documentation of [that] concept.” Exhibit A at ¶ 8 to NRG Response.¹³

Moreover, NRG’s argument has in effect been rejected under the patent statutes. NRG attempts to cast doubt on Mr. Bangert’s invention because he may have conceived and developed the idea quickly instead of working for a long time to create the invention. However, under 35 U.S.C. § 103, “[p]atentability shall not be negated by the manner in which the invention was made.” This provision means that “it is immaterial whether [the invention] resulted from long toil and experimentation or from a flash of genius.” 35 U.S.C. § 103, historical & revision notes. In particular, § 103 has been used to reject an argument that the inventor had no relevant past experience with the area of technology and “immediately conceived the successful design.” Shiley, Inc. v. Bentley Laboratories, Inc., 794 F.2d 1560, 1568 (Fed. Cir. 1986).

¹³ NRG also improperly compares Mr. Bangert’s alleged development time to Mr. Graham’s time of development. In particular, NRG states that it took Mr. Graham “160 hours of development work,” but cites no evidence to support that statement. NRG Response at 19; see id. at 11. However, even assuming that Mr. Graham engaged in that many hours of work, much of that work had little relation to actually developing the technology at issue. Mr. Graham engaged in a “a great deal of investigation” of what oilfield products and services were currently available to develop NRG’s oilfield leases, including “call[ing] numerous oilfield equipment vendors and service companies to gather information about what ‘off-the-shelf’ products were available and what they could do.” Exhibit A at ¶¶ 7, 6 to NRG Response. Further, as NRG admits, Mr. Graham’s activity included all of his work to conceive and document the entire “multilateral well drilling and completion system” for the “Saratoga Field.” NRG Response at 11. The entire system included work on a “horizontal drilling solution to the Saratoga Field problems.” Exhibit A at ¶ 4 to NRG Response. It also included the “develop[ment of] an initial plan for the Saratoga Field” by the “end of September, 1991.” Id. at ¶ 9. It was not until after that time in “October 1991” when Mr. Graham claims to have “conceived [of] a multilateral well completion system that [he] believed would solve the Saratoga Field problems.” Id. at ¶ 8. Also, the technology at issue was only an “aspect” of the “completion system” which, in turn, was only a part of the entire well drilling and completion system that he developed. Id. at ¶¶ 8, 4; NRG Response at 11. Accordingly, it is readily apparent that only a small part or “aspect” of Mr. Graham’s purported 160 hours of work was spent on the actual conception and development of the technology at issue.

D. Mr. Bangert's Status Has No Bearing on the Propriety of Summary Judgment.

NRG incorrectly asserts that, "because [Mr.] Bangert's testimony is [defendants'] only evidence of independent development, and because Mr. Bangert is an "interested witness," summary judgment is inappropriate because such testimony "will not support a summary judgment" under Rule 166a(c). NRG Response at 35-37. To the contrary, as set forth above, a multitude of documentary evidence and testimony from various individuals, only one of whom is Mr. Bangert, supports defendants' motion. Indeed, that evidence corroborates Mr. Bangert's testimony, and Mr. Bangert's testimony is, in many respects, merely cumulative evidence of that other evidence.

In any event, Mr. Bangert is not an "interested" party under Texas case law, and thus his testimony alone is sufficient for summary judgment to be entered in defendants' favor. An interested party is one who has "a pecuniary interest in the outcome of a lawsuit," such as a person who is a party, employed by a party, or who could benefit depending on the outcome of the case. Martin v. Cloth World of Texas, Inc., 692 S.W.2d 134, 135-36 (Tex. App.—Dallas 1985); see Hayes v. E.T.S. Enterprises, Inc., 809 S.W.2d 652, 656 (Tex. App.—Amarillo 1991, writ denied). Mr. Bangert does not qualify as an interested witness because he is not a defendant, he has not been employed by any of the defendants since he was laid off in 1992, and he has no pecuniary interest in the outcome of this lawsuit. Exhibit 18 at 26-28 to Defendants' Motion; see Plaintiff's Second Amended Original Petition at 1.

NRG also has failed to show that Mr. Bangert can benefit if defendants prevail. NRG asserts only that Mr. Bangert "is interested in maintaining his story that he invented the Technology" because he "is the named inventor" on United States Patent No. 5,322,127. NRG Response at 35. However, Mr. Bangert assigned that patent to defendant Baker Hughes Inc. (see Exhibit 1 at 1 to Defendants' Motion), and thus he has no interest whatsoever in that patent. Accordingly, the outcome of this case will not impact any patent rights or any other rights of Mr. Bangert.

NRG also erroneously asserts that Mr. Bangert has “an interest in assisting” defendants in this case because defendants paid him “to testify for them.” NRG Response at 35. However, as Mr. Bangert stated in the testimony NRG cites, he was being compensated only for his lost time in appearing in the deposition, and only at a “typical consultant rate.” Exhibit 50 at 54.¹⁴ Any person compensated merely for his lost time to appear at a deposition, like Mr. Bangert, has no interest in the outcome of a case because such a person is paid prior to and regardless of any outcome. Moreover, NRG conveniently fails to mention that NRG also agreed to share in the costs associated with having Mr. Bangert traveling from Louisiana and attending his deposition, and paid hundreds of dollars of those costs, but afterward refused to reimburse Mr. Bangert for his lost time or hotel room, leaving defendants to bear the full cost. See Exhibits 58 & 59. Accordingly, Mr. Bangert is not an “interested” witness in defendants’ or anyone else’s favor in this case.¹⁵

Finally, NRG incorrectly asserts that Mr. Bangert’s testimony “is not readily controvertible” because “his credibility concerning his knowledge of the NRG disclosures will be one of the dispositive factors” of this case. NRG Response at 36. To the contrary, NRG has had ample opportunity to “controvert” Mr. Bangert’s testimony about his knowledge, even though NRG has utterly failed in that regard. Under Rule 166a(c) of the Texas Rules of Civil Procedure, “summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence . . . could have been readily controverted.” In this case, NRG has taken 29 depositions in the past year of current and past employees of defendants, including all employees to whom NRG disclosed any of its “proprietary information” prior to Mr. Bangert’s independent development of the material in defendants’ patents, and those employees who were present during Mr. Bangert’s

¹⁴ Contrary to NRG’s assertion (NRG Response at 35), Mr. Bangert never testified that defendants agreed to “keep paying.” See Exhibit 50 at 54.

¹⁵ Moreover, it is truly ironic for NRG to assert that Mr. Bangert is somehow an “interested” witness and thus summary judgment is improper, while simultaneously paying two “expert” witnesses to opine on the credibility of Mr. Bangert’s factual testimony for NRG’s version of the case.

development. Thus, if there were any evidence to controvert Mr. Bangert's testimony, NRG has had every opportunity to find it. NRG's failure in this regard does not mean that Mr. Bangert's testimony is not "readily controverted" and cannot be used to support summary judgment. Rather, it reflects that, despite numerous opportunities to adduce evidence contrary to Mr. Bangert's testimony, NRG has failed to do so. Mr. Bangert's testimony is corroborated by other witnesses and documentary evidence, and summary judgment must be entered in defendants' favor.

E. The Affidavits of Dr. Economides and Mr. Stone Do Not Constitute Competent Evidence to Create a Factual Dispute, and are Improper and Should be Stricken in any Event.

NRG's desperation on summary judgment, and lack of any evidence to support its theory, is blatantly apparent from its use of the affidavits of two paid expert witness to comment on the credibility of Mr. Bangert. As part of its response to one of defendants' motions for summary judgment, NRG filed the affidavit of Dr. Michael J. Economides as an expert witness. Because the affidavit was improper, defendants then moved to strike that affidavit. In response, NRG filed an "amended" affidavit from Dr. Economides, and NRG filed an additional affidavit from yet another expert witness, Mr. Charles R. Stone, on the same subject. However, despite NRG's desperate machinations, both affidavits are of no consequence because there is no evidence to place any doubt on Mr. Bangert's credibility and, indeed, all of the evidence set forth above corroborates his testimony. Further, those affidavits are improper and should be stricken.

As set forth in detail in Defendants' Objections to and Motion to Strike Amended Affidavit of Michael J. Economides and Affidavit of Charles R. Stone (Dec. 3, 1997) ("Motion to Strike"), those affidavits are not competent summary judgment evidence because they contain evidence of nothing. *Id.* at 2-5. In their affidavits, Dr. Economides and Mr. Stone speculate that Mr. Bangert knew NRG's technology and used it to create his invention disclosure. *Id.* at 3-4; Exhibit C at 1, 13, 14 to NRG Response; Exhibit E at 1, 6-8 to NRG Response. However, neither expert witness provides any new facts that they discovered through their own investigation, but instead they merely recite their understanding of facts based on the same documents and testimony that NRG

has presented to this Court in response to defendants' motion. Motion to Strike at 3-4; Exhibit C at 3-4, 6-13 to NRG Response; Exhibit E at 1, 9-10 to NRG Response. Dr. Economides and Mr. Stone also present no evidence that Mr. Bangert ever actually saw or relied on NRG's technology. Motion to Strike at 3-5; Exhibit C at 3-4, 6-13 to NRG Response; Exhibit E at 1, 5-10 to NRG Response. Accordingly, their affidavits contain nothing more than pure conjecture and conclusory statements on the ultimate issue before this Court, and thus are not "probative evidence of the facts at issue" and should be stricken. See Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (an expert's affidavit cannot "raise a fact issue" about a defendant's knowledge of something if the affidavit does not "offer[] any evidence that [the defendant] had actual knowledge" of that thing). Indeed, Dr. Economides and Mr. Stone never even consider the uncontroverted documentary and testimonial evidence contrary to their unsupported conclusions.¹⁶

In addition, their affidavits should be stricken because they are not based on any "scientifically reliable foundation." Motion to Strike at 7-8. Dr. Economides and Mr. Stone have not even attempted to demonstrate that they relied for their opinion on a known, accepted, and/or tested methodology for determining whether a trade secret was misappropriated. Id.; Exhibit C at 1-2, 13, 14 to NRG Response; Exhibit E at 1, 5-8 to NRG Response. They also have not shown that their evaluative techniques are appropriate and reliable methodologies. Motion to Strike at 7-8; Exhibit C at 1-2, 13, 14 to NRG Response; Exhibit E at 1-2, 5-10 to NRG Response. Dr. Economides states only that he has "relied on universally accepted academic criteria and criteria of intellectual robustness," and Mr. Stone states only that he has used "research into universally accepted engineering design concepts and methodologies." Exhibit C at 2 to NRG Response;

¹⁶ For similar reasons, their affidavits should be stricken because they opine on an issue on which the trier of fact will not be guided "solely" by expert testimony. Motion to Strike at 5-6. The issue of whether Mr. Bangert saw or used NRG's technology requires no expert testimony at all, but merely requires a review of the fact adduced in the case. Thus, the type of expert testimony proffered by Dr. Economides and Mr. Stone is improper. See Anderson v. Snyder, 924 S.W.2d 54, 55 (Tex. 1991); Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986).

Exhibit E at 1, 2 to NRG Response. However, an expert's "self-serving statements that his methodology was generally accepted and reasonably relied upon by other experts in the field are not sufficient to establish the reliability of the technique and theory underlying the opinion." E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 559 (Tex. 1995). Consequently, their opinions are not grounded in the methods and procedures of any valid science, and are inadmissible because they are nothing more than "subjective belief or unsupported speculation." See id. at 556-59.¹⁷

Ultimately, Dr. Economides and Mr. Stone do not and cannot know whether Mr. Bangert saw or used NRG's technology. They rely exclusively on the extensive discovery adduced by NRG that reveals no evidence to support such a conclusion, and they have determined no facts of their own. Indeed, if NRG had any evidence to legitimately oppose defendants' motions, NRG would not have felt the need to hire expert witnesses to "create" evidence where none exists. Thus, Dr. Economides and Mr. Stone have been hired merely to repeat NRG's story, and the Court should disregard their unfounded "conclusions" because they amount to nothing more than purchased guesses and fail to satisfy the Texas Supreme Court's standards. See Robinson, 923 S.W.2d at 559.

II. NRG'S FAILURE TO DISPUTE DEFENDANTS' INDEPENDENT DEVELOPMENT MANDATES SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON ALL OF NRG'S CLAIMS.

Because NRG has failed to raise any genuine issue of disputed fact that defendants' independently developed the information in defendants' patents for the reasons set forth above, summary judgment is appropriate on all of NRG's claims. NRG does not dispute that summary judgment must be entered on six of its ten claims under such circumstances. Instead, NRG argues that its claims for breach of contract, fraud, breach of fiduciary duty, and breach of the duty of good faith and fair dealing will survive even if it has failed to raise any such dispute. See NRG Response

¹⁷ Dr. Economides and Mr. Stone also have not shown that they are experts on the subject of misappropriation of trade secrets. Neither "expert" lists any experience at all on that subject. Motion to Strike at 6-7; Exhibit C at 4-5 to NRG Response; Exhibit E at 1-2, 11-14 to NRG Response.